Reserved.

COURT NO. 3

Criminal Misc. Application No. 33 of 2002.

Sri Gurcharan Singh Kohli ….Applicant

Vs.

Sessions Judge, Nainital & others …..Respondents.

…….

Hon'ble Irshad Hussain, J .

This petition under section 482 of the Code of Criminal Procedure (hereinafter for short 'Code') has been filed for setting aside the orders dated 30.09.1999 and 31.10.2001 passed by ACJM, Haldwani and the order dated 2.12.2001 passed by Sessions Judge, Nainital, contained in Annexures 7, 11 and 12 respectively to this petition.

Heard Sri Sri Sudhir Singh, learned counsel for applicant and Sri Navneet Kaushik, learned counsel for respondent no. 3 and learned A.G.A.

Petitioner deals in real estate and was admittedly holding a power of attorney in his favour on behalf of the executant Smt. Ganga Devi who was shown the owner of plot measuring 80 feet X 40 feet situate at Bareilly road, Haldwani district Nainital. Petitioner as an attorney executed sale deed of the plot in favour of respondent no.3 and delivered possession.

A written complaint (criminal case no.751 of 2001) under sections 420, 468, 471, 472 I.P.C. as well as under section 138 of

Negotiable Instruments Act was filed by respondent no. 3 against the petitioner alleging that it had transpired that the petitioner on the basis of forged and fictitious power of attorney sold land to her by showing that the land was owned by Smt. Ganga Devi wife of Bhawani Datt, the executant of the power of attorney although the alleged executant was not the owner of the land and that she had been cheated by the petitioner. Not only this the petitioner induced her to purchase other plots of land also and by so inducing received sum of Rs. six lacs on different dates from her. When the facts regarding fraud and forgery came to light the petitioner agreed to repay the amount received and also the consideration money of the earlier sale deed and in pursuance of the same gave a cheque of Rs. six lacs to the said complainant on 31.03.1999. When the cheque was presented to the drawee bank it bounced off because the account of the petitioner did not have sufficient fund to honour the cheque. A notice was given, but the petitioner did not pay the amount of the cheque within fifteen days of the receipt of the notice. Complainant-respondent no.3 Smt. Sapna Agarwal examined herself under section 200 of the Code and produced the registration clerk witness Madan Mohan as P.W.2 besides the relevant documents. The learned Magistrate on the basis of the material on record was of the view that prima facie case was made out against the petitioner and directed to summon him for offences punishable under section 467, 468, 471 and 420 of I.P.C. by impugned order dated 30.09.1999.

Petitioner filed objection against the summoning order which was disposed of by an elaborated impugned order dated 31.10.2001 by the learned Magistrate and the objections were dismissed. The learned Magistrate however was of the view that prima facie case was also made out against the petitioner under section 138 of the Negotiable Instrument Act and by the said order the said offence was added in the summoning order.

Petitioner preferred a revision before the learned Sessions Judge Nainital which was dismissed summarily per order dated 22.12.2001.

Learned counsel for the petitioner has submitted that the allegations of the complaint and the statements of the witnesses do not prima facie disclose commissions of any offence and the learned Magistrate failed to take into account the fact that the complainant-respondent no.3 had been delivered possession of the land which was subject matter of the sale deed executed by the petitioner as attorney and further that the cheque for sum of Rs. six lacs was given to the complainant in good faith in pursuance of the agreement that she will re-convey the plot of land as the cost of the land had been by then considerably increased. It was also argued that neither any document was forged nor the complainant-respondent no.3 was in any way cheated by the petitioner.

At the outset it need to be mentioned that disputed and controversial fact cannot be taken into account at the stage of passing summoning order and it is sufficient to find out as to whether prima facie case is made out on the basis of the allegations in the complaint and the statements of the witnesses recorded under sections 200 and 202 of the Code. Annexure-5 to the affidavit of the petitioner is the copy of the written complaint filed by respondent no.3. The allegations as spelt out in the complaint have essential ingredients of the offences punishable under section 420, 468, 471, 472 I.P.C. as well as 138 of the Negotiable Instruments Act. Annexure-6 is the copy of the statement of respondent no.3 which was recorded under section 200 of the Code and in her statement she has fully corroborated the averment and allegations of the written complaint. Perusal of the summoning order reveal that the learned Magistrate had also taken into consideration the statement of another witness, registration clerk Madan Mohan to come to the conclusion that prima facie it is evident that the power of attorney in favour of the petitioner appear to be a forged and fictitious document and on its basis the complainant was cheated to part with the money for and in connection with transfer of plot of land which in fact was not found to be

belonging to the so-called executant of the deed of power of attorney in favour of the petitioner. Here it need to be mentioned that the documents annexed with the counter affidavit of respondent no.3 reveal that the land in question was wrongly entered in revenue record in the name of the husband of Ganga Devi and when relevant proceedings were initiated her husband's name was struck out against the land in question. Initially in the year 1924 name of one Bhawnai Das was recorded as is evident from copy of Khatauni, Annexure-A to the affidavit. Subsequently the name of Bhawani Datt said to be the husband of Smt. Ganga Devi was substituted in place of Bhawani Das in the revenue records of the year 1960 and when this clerical mistake was detected during the correction proceedings under case no. 25/1 of 1977-78 initiated by Kunwar Prithivi Raj Singh the Sub Divisional Magistrate, Bhabhar-Haldwani by order dated 9.11.1977, (Annexure-B to the counter affidavit) directed the name of Bhawani Das to be substituted in place of Bhawani Datt. The error was rectified and an entry was accordingly made in the Khatauni of 1385 Fasli. It is also significant that in Civil suit no. 70 of 1998, Smt. Ganga Devi Vs Irshad and others, the petitioner as the power of attorney of plaintiff of the suit also put his appearance and despite repeated directions failed to produce the said plaintiff in person. The compliance was not made and finding that Smt. Ganga Devi appear to be an imaginary and fictitious name, the suit was dismissed as having been abated for non-existence of the plaintiff. The copy of the order dated 2.11.1998 passed by the Civil Judge is paper no.42 of the counter affidavit. Further by order dated 28.08.2001, the competent officer in case no.13/15 of 1999-2000 under section 54 of the Revenue Act permitted the respondent no.3 to withdraw his objections which she had filed against the cancellation of mutation in her favour against the land in question in view of the fact that another objector named as Gurdeep Singh had come into picture claiming that he had purchased the land in question way back in the year 1978 and that Smt. Ganga Devi was not the recorded owner of the land in question and the power of

attorney dated 24.04.1995 said to have been executed by her in favour of the petitioner is a forged and fictitious document and also on account of the fact that the land in question was of category 12-B to which provisions of the U.P.Z.A. & L.R. Act did not apply and State government continued to be the owner of the same which could not have been made subject matter of any transfer. The copy of this order is Annexure-CA to the counter affidavit. All these facts prima facie indicate that Smt. Ganga Devi was not the recorded owner of the land and any power of attorney on the basis of which sale deed was executed in favour of respondent no.3-complainant prima facie appear to be fictitious and forged document which was utilized as alleged to play fraud and to cheat the said purchaser.

It is further evident that petitioner had filed a complaint alleging that he has given a cheque of Rs. six lacs in view of the agreement of resale of the land which was initially purchased by respondent no. 3 and that the said complainant had neither returned the cheque nor transferred the land to her by valid sale deed and thus committed offences of criminal breach of trust and cheating punishable under sections 406, 417 and 420 of the I.P.C. The criminal complaint was numbered as criminal case no.2085 of 1999 and the same was dismissed under section 203 of the Code per order dated 17.11.1999 passed by the Judicial Magistrate, Haldwani. Annexure CA-3 to the affidavit is the copy of the said order. Revision preferred against the said order by the petitioner was dismissed per judgment and order dated 03.05.2000 passed by Sessions Judge, Nainital, Annexure-CA-4. This state of affair further indicate that the contention of the petitioner is apparently without merit as there is no material on record to support the submission of the petitioner that no prima facie case was made out so as to pass the summoning order against the petitioner.

Learned counsel for the petitioner also raised a legal plea that the learned Magistrate had no jurisdiction to review his earlier summoning order and to add section 138 of the Negotiable

Instruments Act also for which the petitioner was to stand trial. The order to this effect was passed when the learned Magistrate went on to decide on merit the objections filed by the petitioner against the summoning order dated 30.09.1999. It appear from the summoning order dated 30th September, 1999 that the learned Magistrate had not made any observation that prima facie no case was made out under section 138 of the Negotiable Instruments Act on the basis of the allegations of the written complaint and evidence adduced under section 200 of the Code. It was merely an omission in the summoning order and when the matter was considered on filing of the objections by the petitioner the omission was detected and learned Magistrate added section 138 of the Negotiable Instruments Act for which the petitioner was to stand trial as well. In the peculiar facts and circumstances of the case, it cannot safely be accepted that the learned Magistrate acted without jurisdiction is passing order to this effect while dismissing the objections preferred by the petitioner against the summoning order. From above it is thus obvious that the petitioner has failed to make out case for interference in the summoning orders passed by the learned Magistrate and the petition being devoid of merit is liable to be dismissed.

Petition is dismissed accordingly.

19.04.2003/B. **(Irshad Hussain, J.)**